DISTRIBUTED

NOV 29 1985

No. 85-541

Supreme Court, U.S.
FILED
NOV 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
ROGER B. HENDRIX
General Counsel
WALLACE C. TYSER, JR.
Assistant General Counsel
WILLIAM B. WEBB, JR.
Senior Corporate Counsel
BARCLAYSAMERICAN
CORPORATION
201 South Tryon Street
P.O. Box 31488
Charlotte, N.C. 28231
(704) 372-0060

DOUGLAS N. CAMPBELL, ESQ.
Counsel of Record
LAURA E. STEVENSON, ESQ.
MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY
Suite 950, The Equitable
Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 658-1400

Attorneys for Petitioner

BFP

TABLE OF CONTENTS

		Page
TABLE OF CONTENTS		i
TABLE OF AUTHORITIES		ii
REPLY TO REASONS FOR NOT GRANTING THE WRIT		1
I.	Introduction	1
II.	The Views Of The Federal Home Loan Bank Board And Its General Counsel Are Entitled To Great Deference.	2
III.	Neither The Vartanian Letter Nor The FHLBB Amicus Curiae Briefs Represent "Post Hoc Rationalizations" By The FHLBB Of Its Position With Regard To 12 C.F.R. § 590.4(h) — The FHLBB *Amicus Curiae* Briefs Simply Adopt The Position Of The General Counsel Stated In The Vartanian Letter.	7
IV.	A Statutorily Required Action, Such As The Giving Of A 30-day Notice By The Creditor Prior To Foreclosure, Does Not Have To Be Expressly Contained In The Sales Contract In Order For The Debtor To Acquire An Enforceable Right To Receive The 30-Day Notice.	9
V.	Conclusion	10

TABLE OF AUTHORITIES

CASES	Page
Bread Political Action Committee v. Federal Election Committee, 455 U.S. 577 (1982)	8
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. ____, 104 S. Ct. 2778 (1984)	6
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	9
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980)	3, 4, 5
Gerlach v. Allstate Insurance Co., 338 F. Supp. 642 (S.D. Fla. 1972)	5
Michaels v. Federal Savings and Loan Insurance Corp., 413 F.2d 144 (7th Cir. 1979)	4, 5
Udall v. Tallman, 380 U.S. 1 (1965)	5, 6
STATUTES & REGULATIONS	
Depository Institutions Deregulation And Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (March 31, 1980), codified at 12 U.S.C. § 1735f-7 note	passim
2 U.S.C. § 437h(a)	8
15 U.S.C. § 1601 *et seq.*	3
15 U.S.C. § 1640(f)	4
12 C.F.R. § 590.4(h)	passim
12 C.F.R. § 500.17	3
MISCELLANEOUS	
5 Fed. Banking L. Rep. (CCH) ¶83,027 (1983)	passim

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner,

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, and
All Other Persons Similarly Situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BarclaysAmerican/Credit, Inc. [hereinafter "BarclaysAmerican"], the Petitioner herein, respectfully prays that this Court reject the arguments presented by the Quillers in their Brief In Opposition To Petition For Writ Of Certiorari and that a Writ Of Certiorari issue to review the July 8, 1985, *en banc* judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

I. Introduction

In this reply, BarclaysAmerican will address three arguments raised by the Quillers which were not *per se* addressed in BarclaysAmerican's Petition For Writ Of Certiorari.

II. The Views Of The Federal Home Loan Bank Board And Its General Counsel Are Entitled To Great Deference.

A major thrust of the Quillers' Brief In Opposition is their attempt to diminish the authority of the opinion letter issued by the Federal Home Loan Bank Board's [hereinafter "FHLBB" or the "Board"] General Counsel, Thomas P. Vartanian, on October 28, 1982, 5 Fed. Banking L. Rep. (CCH) ¶83,027 (1983) [hereinafter "the Vartanian Letter"] (Appendix J[1]). They seek to do this in three ways: first, by making a vicious and unprecedented attack upon the office of the General Counsel of the FHLBB, alleging that the General Counsel's office "has not been an impartial agency issuing interpretations of its regulations, but has been an advocate of certain mobile home finance companies, issuing *post hoc* rationalizations," Brief In Opposition To Petition For Writ Of Certiorari, p. 7, n. 3; secondly, by characterizing the Vartanian Letter as an "unofficial opinion" which, they argue, because of its "unofficial status" is not entitled to any deference by this Court; and, finally, by referring to the Vartanian Letter as a "*post hoc* rationalization" of the meaning of the regulation. The first of those contentions is scarcely worthy of comment, except perhaps the observation that the First Amendment to the Constitution guarantees all citizens the right to go to the government and express views and make requests of the government, and there is nothing improper in that. U.S. Const. amend. I. Furthermore, it is presumed that government agencies act with propriety, including, as in this instance, expressing *honest* opinions when opinions are expressed. Certainly nothing in the record of this case gives any indication to the contrary with regard to the Vartanian Letter. The other two contentions are discussed *seriatim* below.

---

1. The Appendix to the Petition For Writ Of Certiorari was filed as a separate document. Citations to portions of a particular appendix will be as follows: "App. ___ at ___."

The Quillers point out that there was no specific delegation of authority from the FHLBB to the General Counsel to issue "interpretations" pursuant to § 501(f) of DIDMCA. However, 12 C.F.R. § 500.17 describes the authority of the FHLBB's General Counsel as follows:

> The General Counsel is the chief legal officer of the Board and has, among other functions, those set forth below. He is responsible for the representation of the Board and the Federal Savings And Loan Insurance Corporation in judicial proceedings in which the Board or the Corporation is involved as a party or as amicus curiae. . . . *He is responsible for advising the Board with respect to interpretations involving questions of law*, for the preparation of legislation submitted by the Board to Congress, for the preparation of Board comments to Congress upon pending legislation, *and for the preparation of regulations*. . . .
>
> (Emphasis added).

The General Counsel possesses broad authority under the FHLBB regulations, particularly in legal matters. The construction of the language of a regulation promulgated by the FHLBB is peculiarly within the ambit of the General Counsel's authority, especially in view of the General Counsel's participation in the drafting of regulations.

The Quillers attempt to distinguish *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) [hereinafter "*Milhollin*"], from the case *sub judice* on the basis that "Congress conferred special status upon official staff interpretations" of the Federal Reserve Board [hereinafter "FRB"] under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* Brief In Opposition To Petition For Writ Of Certiorari, p. 16. In *Milhollin*, this Court held "that the Court of Appeals erred in rejecting the views of the Federal Reserve Board and staff," 444 U.S. at 570, as expressed in an Official Staff Interpretation and three unofficial Public Information Letters, stating that "[u]nless demonstrably irrational, Federal

Reserve Board staff opinions construing the act or regulations should be dispositive. . . ." 444 U.S. at 565.

It is important to note that, in *Milhollin*, the levels of the FRB's interpretative authority (*e.g.*, "official," "unofficial," etc.) designated by 15 U.S.C. § 1640(f) were not dispositive of the issue in that case. 444 U.S. at 566, n.9. Rather, the issue in *Milhollin*, as in this case, was whether the lower court, in deciding what Regulation Z actually meant, had failed to give appropriate deference to the FRB's interpretation of its own regulations. As the discussion below will demonstrate, in a non-reliance case, an agency's own interpretation of the statute it administers and the regulations promulgated thereunder are entitled to great deference in guiding judicial construction, regardless of the source of the interpretation within the agency.

The rule that agency interpretations are entitled to "great deference" by the courts has been applied to opinions of the General Counsel of the FHLBB. In *Michaels v. Federal Savings and Loan Insurance Corp.*, 413 F.2d 144 (7th Cir. 1979), the issue was whether the triggering date for determining who is an insured under FSLIC insurance was the date a defaulting savings and loan association was taken into custody by state officials, as the plaintiff contended, or the date default was formally declared, as the FSLIC contended. Plaintiff's husband died between the two dates, and she became sole owner of the couple's joint and separate accounts. The court held that Mrs. Michaels could recover the insurance only for herself, but not for her husband, because the identity of the insureds is determined as of the date of default, 413 F.2d at 146, explaining that this

> interpretation is in conformity with that of the defendant agency, which is charged with the administration of the National Housing Act. . . . The position that the default date determines the status of an insured account was taken by the FSLIC as early as March, 1937, see 3 Fed. Home Loan Bank Review 187 (1936-1937), and has been repeated in later opinions of the General Counsel of the Federal Home Loan Bank Board (the

> operating head of the defendant). The uniformity of this position, along with the lack of judicial interpretation of the relevant sections of the Act, is entitled to "great deference" in our statutory interpretation. See *Udall v. Tallman*, 380 U.S. 1, 16 . . . (1965).
>
> 413 F.2d at 147 (footnote omitted).

The *Michaels* court recognized, without discussion, the authority of the FHLBB's General Counsel to issue opinions with regard to matters under the auspices of the FHLBB.

It is significant that the *Michaels* court relied on the leading case of *Udall v. Tallman* as authority for the deference rule. In *Udall*, this Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . *When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.*
>
> 380 U.S. at 16 (emphasis added).

This same passage from *Udall* was relied upon by this Court in *Milhollin*, 444 U.S. at 566. Thus, the rule of deference in cases like this is dependent, not upon whether the particular interpretation is the product of a specific grant of authority, but upon the recognition of an agency's expertise which follows from its general authority to administer a specific act and promulgate regulations. Therefore, under *Udall*, the deference rule should be given much broader application than that urged by the Quillers.

Moreover, even under the TILA, which was at issue in *Milhollin*, there is nothing which precludes a court from considering even an advisory opinion of the Federal Reserve Board. For example, in *Gerlach v. Allstate Insurance Co.*, 338 F. Supp. 642 (S.D. Fla. 1972), the plaintiff asserted that the TILA applied to premium payment plans under an insurance policy. The district court dismissed the plaintiff's

complaint, noting that the issue was one of first impression. The court relied on certain "correspondence releases by the Federal Reserve Board. . . published in the CCH Consumer Credit Guide" in distinguishing the premium plan of Allstate from a premium financing situation, noting that the correspondence releases were persuasive, although not binding, authority. 338 F. Supp. at 648.

In summary, even though the Vartanian Letter standing alone may not be equivalent to an "interpretation" of the Board, it would be entitled to deference in view of the FHLBB General Counsel's responsibilities vis-a-vis the Board's regulations. Furthermore, the fact that Mr. Vartanian's views have been adopted by the Board itself clearly makes those views entitled to the "great deference" to be accorded under *Udall*.

The Quillers next argue that the Vartanian Letter is merely a "*post hoc* rationalization," placing great emphasis upon the timing of the Vartanian Letter; however, the sequence of events in this suit arguably enhances, rather than diminishes, the authoritativeness of the Vartanian Letter. The DIDMCA regulations went into effect on July 30, 1980, and the Quiller contract was entered into on June 27, 1981, the Vartanian Letter followed on October 28, 1982, and the Quillers filed suit on March 2, 1983, approximately four months later. Accordingly, the Quillers cannot contend that the Vartanian Letter was the product of political machinations on the part of BarclaysAmerican.

Moreover, this Court has held that the political origins and policy disputes surrounding the promulgation of regulations and agency interpretations are not proper areas of inquiry by the judiciary. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. ___, 104 S. Ct. 2778 (1984). The issue in that case was whether the Environmental Protection Agency's regulatory definition of the statutory term "stationary source" was a reasonable construction. 104 S.Ct. at 2780. This Court held that the Agency's definition of "stationary source" should have been followed by the Court of Appeals. In addition, this Court

found that an agency's interpretation should not be discredited by the fact that the agency may have been influenced by public policy disputes and considerations, stating:

> The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the bubble concept, but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.
>
> * * *
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

104 S. Ct. at 2793 (footnote omitted)(citation omitted).

Accordingly, the arguments raised by the Quillers concerning the political genesis of the Vartanian Letter and the FHLBB *amicus* briefs should be disregarded by this Court.

III. Neither The Vartanian Letter Nor The FHLBB Amicus Curiae Briefs Represent "Post Hoc Rationalizations" By The FHLBB Of Its Position With Regard To 12 C.F.R. § 590.4(h), The FHLBB *Amicus Curiae* Briefs Simply Adopt The Position Of The General Counsel Stated In The Vartanian Letter.

The Quillers attack the FHLBB's *amicus curiae* briefs as "*post hoc* rationalizations. . . obtained *ex parte* in connec-

tion with pending litigation [which] are inconsistent with [DIDMCA]." Brief In Opposition To Petition For Writ Of Certiorari, p. 15-16. However, the two cases cited by the Quillers as establishing grounds for such criticism are completely inapposite to the case *sub judice*. In *Bread Political Action Committee v. Federal Election Committee*, 455 U.S. 577 (1982), this Court had under consideration the construction of 2 U.S.C. § 437h(a), which controlled standing to sue under the Federal Election Campaign Act [hereinafter "FECA"]. The parties seeking to assert a claim under the FECA submitted the post-litigation affidavit of Senator James Buckley, who had prepared the original draft of the statute, in an effort to substantiate their interpretation of the scant legislative history of the FECA concerning standing. This Court stated that it could not

> give probative weight to the affidavit because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act,' . . . "*[p]ost hoc* observations by a single member of Congress carry little if any weight."
>
> 455 U.S. at 582, n. 3 (citations omitted).

In contrast to this case, the *Bread Political Action Committee* case did not involve a regulation or an interpretation by the Federal Election Commission or any other agency, but involved an interpretation of the statute itself. The parties seeking standing in the *Bread Political Action Committee* case submitted the affidavit of Senator Buckley for the purpose of *clarifying and explaining* an act of Congress. That is totally different from an agency opinion issued in accordance with a regulatory scheme established by a statute which actually contemplates an ongoing interpretative process by the agency. In this case, the Vartanian Letter was issued by the General Counsel of the agency charged by Congress with administering DIDMCA and promulgating regulations thereunder. The FHLBB's *amicus curiae* briefs simply *adopt* the views expressed in the Var-

tanian Letter, which is directly on point to the issue in this case.

The second case cited in support of the Quillers' *post hoc* rationalization argument, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) is also inapposite to this case. In the *GTE Sylvania, Inc.* case, this Court was again presented with a question of statutory (not regulatory) construction. Pursuant to a Freedom Of Information Act [hereinafter "FOIA"] request, the Consumer Product Safety Commission [hereinafter "CPSC"] released certain information concerning various accident reports, some of which were labelled confidential by the manufacturers, without first following the procedures under the Consumer Product Safety Act [hereinafter "CPSA"] of notification to the relevant manufacturers. This Court found that the CPSA and the FOIA, read together, required that the CPSA notification procedures must be followed prior to release of information pursuant to a FOIA request. In so holding, this Court rejected a CPSC administrative interpretation of the CPSA issued *after* the CPSC had released the information involved in that case and *after* the manufacturers had filed their actions. This Court also rejected legislative commentary made after the passage of the CPSA. Again, the courts apply a different rule where the question involves construction of an act of Congress, as in the *G.T.E. Sylvania, Inc.* case, than where the construction of an agency's own regulation is at issue, as in this case.

IV. A Statutorily Required Action, Such As The Giving Of A 30-day Notice By The Creditor Prior To Foreclosure, Does Not Have To Be Expressly Contained In The Sales Contract In Order For The Debtor To Acquire An Enforceable Right To Receive The 30-Day Notice.

The Quillers, in perhaps their most startling statement in this litigation to date, again argue, as they did in their Cross-Petition For Writ Of Certiorari, that, under general

maxims of contract construction, the absence from a contract of a provision specifying that the 30-day notice required by 12 C.F.R. § 590.4(h) be given would result in the debtor's having no enforceable right to the notice because only express requirements of the contract are enforceable. This argument, if adopted by this Court, would represent a radical departure from traditional American jurisprudence on this subject, and is dealt with by BarclaysAmerican in its Brief In Response To Cross-Petition For Writ of Certiorari at Section II, and BarclaysAmerican simply incorporates that discussion herein.

V. Conclusion

In conclusion, BarclaysAmerican respectfully prays that this Court grant its Petition For Writ Of Certiorari.

Respectfully submitted,

MITCHELL, LOGGINS,
CAMPBELL & ELSBERRY
Douglas N. Campbell
Counsel Of Record
Laura E. Stevenson
Counsel for Petitioner

Dated: November 27, 1985